United States Court of Appeals

for the Second Circuit

APPENDIX

74-1388

R
P/S

in the
United States Court of Appeals
for the Second Circuit

CASE NO. 74-1388

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

vs.

RAUL ORTEGA-ALVAREZ, a/k/a
RAUL ORTEGA, et al,
Defendants-Appellants.

Appeal from the United States District Court for the Southern District of New York

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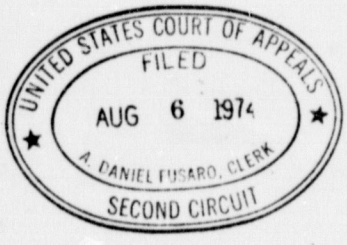
AMENDED

APPENDIX FOR APPELLANT



MAX B. KOGEN, P.A.
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MIAMI REVIEW — 371-6653 — 377-3721

PAGINATION AS IN ORIGINAL COPY

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INTRODUCTORY STATEMENT

The Amended Appendix herein serves to delete Appendix Pages 17-26 of the original Appendix and to substitute the within contents in place and stead of the aforesaid pages 17-26.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------x

UNITED STATES OF AMERICA,

-against-

RAUL ORTEGA-ALVAREZ, a/k/a RAUL ORTEGA, et als.,

Defendants.

----------x

NOTICE OF MOTION

73 Cr. 950
74 Cr. 18

S I R S :

PLEASE TAKE NOTICE that upon the annexed affidavit of HARVEY J. MICHELMAN, duly sworn to the 17th day of December, 1973, upon the indictments and upon all other papers and proceedings heretofore had herein, the defendant, RAUL ORTEGA-ALVAREZ, a/k/a RAUL ORTEGA, will move this Court on December , 1973, in Room of the United States Courthouse Foley Square, City, County and State of New York, at .m. in the noon of that day for the following orders:

(a) Dismissing the indictment with prejudice upon the following grounds:

(1) Double Jeopardy

(2) Collateral estoppel

(b) together with such other and further relief as the Court may deem just and proper under the circumstances.

Yours, etc.

HARVEY J. MICHELMAN
MICHELMAN & MICHELMAN
Attorneys for Defendant
250 West 57th Street
New York, New York 10019

TO: HONORABLE PAUL J. CURRAN
UNITED STATES ATTORNEY
Foley Square
New York, New York

SHIRAH NEIMAN, Asst. U.S. Attorney

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

-against-

RAUL ORTEGA-ALVAREZ
a /k/a RAUL ORTEGA, et al.,

Defendants.

AFFIDAVIT

73 Cr. 950

STATE OF NEW YORK)
: SS.:
COUNTY OF NEW YORK)

HARVEY J. MICHELMAN, being duly sworn, deposes and says:

1. That I am the attorney for RAUL ORTEGA, the defendant herein and make this affidavit in support of the instant motion dismissing the indictment upon the grounds of double jeopardy and collateral estoppel, which motions, if not granted on the papers herein would require an evidentiary hearing before they could in any manner be resolved in favor of the government.

2. The motions must be granted because the defendant herein has previously entered a plea of guilty to an "information" in the United States District Court, Southern District of Florida (a copy of the same is annexed hereto marked Exhibit "A" and made a part hereof) under indictment No. 71-155 CR (a copy of said indictment is annexed hereto marked exhibit "B" and made a part hereof) from which information was drawn. Said information charged the defendant with purchasing, selling, dispensing or distributing a narcotic drug that is approximately 1,000 grams of heroine not in the original stamped package and not from the original stamped package, from on or about January 20, 1970, continuing to on or about March 13, 1970, beginning in Miami, Dade County, in the Southern District of Florida, and culminating in New York, New York; in violation of Title 26 USC Section 4704(a) and 7237.

3. The indictment presently pending before this Court is a mere amplification and reiteration of the Florida charges to which the defendant has heretofore pleaded guilty and has been sentenced.

4. In the Memorandum of Law submitted herein there is an ample showing that the defendant is being forced to defend himself for a second time on the identical charges, the only difference being that the venue in this instance is the Southern District of New York and in the previous case in the Southern District of Florida.

5. At very least the Court should order a hearing with respect to the claim of double jeopardy and collateral estoppel so that evidence may be offered to substantiate defendant's claims as set forth above and any other facts which would enlighten the Court as to the government's vicious campaign to intimidate the defendant into forcing him to defend himself a second time on identical charges.

6. By reason of all the foregoing it is respectfully requested that the Court grant the defendant, RAUL ORTEGA-ALVAREZ, the following relief:

(A) Dismissal of the indictment with prejudice against the government on the following grounds:

(1) Double jeopardy;

(2) Collateral estoppel, or in the alternative grant a hearing with respect to double jeopardy or collateral estoppel;

(B) together with such other and further relief as to the Court may seem just and proper under the circumstances.

HARVEY J. MICHELMAN

Sworn to before me this
17th day December, 1973.

Copy

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

-against-

#40261

RAUL ORTEGA-ALVAREZ, a/k/a RAUL ORTEGA, et al.,

73 Cr. 950

Defendants.

METZNER, D. J.:

We are dealing here with a seventeen-count indictment, 73 Cr. 950, which charges twenty-two defendants with conspiracy to traffic in narcotics and charges twenty of them with various substantive crimes growing out of the conspiracy.

Count one, the conspiracy count, charges that each of the defendants conspired from December 1, 1969 until April 30, 1971 with each other and with Ramiro Gonzalez and Miguel Rodriguez, unindicted coconspirators, to violate Sections 173 and 174 of Title 21, and Sections 4701, 4703, 4704(a) and 4771(a) of Title 26. Counts two through seventeen each charge separate violations of 21 U.S.C. §§ 173 and 174. The government indicated

in its answering papers its intention to move at trial to strike the tax provisions from the conspiracy count, thereby charging the defendants only with a conspiracy to violate 21 U.S.C. Sections 173 and 174. Therefore, paragraph 4 of Count One, as well as all references to the tax provisions in paragraph 1 of Count one, are stricken. We turn now to the various motions made to dismiss the indictment.

6. Raul Ortega-Alvarez App. 7

This defendant claims double jeopardy on the basis of his plea of guilty to a one-count information in the Southern District of Florida on May 24, 1971. The information charged him with the sale of 1,000 grams of heroin in New York in violation of 26 U.S.C. § 4704(a). It was there alleged that the transaction occurred from on or about January 20, 1970 to on or about March 13, 1970, and began in Miami and ended in New York.

The government contends that while the Florida information is related to the instant case because it represents overt act six in the instant indictment, this does not add up to double jeopardy. It contends that the sale embraced in the overt act was only the first shipment of a total cache of sixty kilograms which this defendant had imported into the country for distribution to the other defendants in this case.

The conspiracy charge in this case is not barred by double jeopardy since it represents the first time that the defendant has been tried for this crime. His plea of guilty to a substantive violation of the narcotics law is no bar to this subsequent charge of conspiracy. United States v. Kramer, supra at 913. In addition, there is no bar to the government's inclusion of overt act six in the conspiracy count even though the defendant has been convicted of the crime which that act represents. United States v. Camisi, 248 F.2d 102, 107 (2d Cir.), cert. denied, 355 U.S. 912 (1957); United States v. Keine, 436 F.2d 850, 855 (10th Cir. 1971), cert. denied, 402 U.S. 930 (1972).

It is also apparent from the face of the Florida information and the instant indictment that the substantive transactions in each are different in law and no further evidentiary hearing is required. The prior guilty plea involved a transfer of heroin on March 13, 1970 to a federal agent in violation of the tax provisions. Counts two and three of this indictment relate to the transfer of twenty kilograms and one kilogram of heroin respectively in violation

of Sections 173 and 174. The offenses are therefore not the same in law. In addition, they are different in fact since the Florida conviction related to a sale to an undercover agent whereas the instant charges refer to transfer of large quantities of heroin during this same period of time to co-conspirators a nd codefendants. These are factually two different crimes. This motion to dismiss is denied.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- -x

UNITED STATES OF AMERICA, :

:

-against- :

:

RAUL ORTEGA,ALVAREZ, :

:

Defendant. :

- -x

NOTICE OF MOTION

Indictment No. 74 Cr. 18

S I R S :

PLEASE TAKE NOTICE, that upon the annexed Affidavits of Raul Ortega and Harvey J. Michelman, duly sworn to the 22nd day of April, 1974, upon indictment herein (74 Cr. 18), Indictment No. 71 Cr. 155 (U.S. District Court, Southern District of Florida), information No. 71 Cr. 281 (U.S. District Court, Southern District of Florida) and upon all prior papers and proceedings heretofore had herein both in the United States District Court, Southern District of Florida and the United States District Court, Southern District of New York, the undersigned will move this Court at a motion term Room 318 on April 29, 1974, at 10:00 o'clock in the forenoon or as soon thereafter as counsel can be heard for an order granting an evidentiary hearing on the question of whether Raul Ortega was denied due process of law by reason of the failure of the United States Attorney's Office in the Southern District of Florida to keep its promise to Ortega that Ortega would not be prosecuted again with respect to the facts underlying the Florida indictment and information, together with such other and further as the Court may deem just and proper under the circumstances.

Dated: New York, New York
April 22, 1974

Yours, etc.

MICHELMAN & MICHELMAN
Attorneys for Defendant
250 West 57th Street
New York, New York 10019

TO: PAUL CURRAN
United States Attorney
ATT: SHIRER NEIDAN

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- x

UNITED STATES OF AMERICA,

-against-

RAUL ORTEGA ALVAREZ,

Defendant.

AFFIDAVIT

Indictment No. 74 Cr. 18

- x

STATE OF NEW YORK)
)
COUNTY OF NEW YORK)

RAUL ORTEGA ALVAREZ, being duly sworn, deposes and says:

1. That I am the defendant herein and make this Affidavit in support of the instant motion for a hearing with respect to the denial of due process afforded me in the securing of my plea of guilty in the United States District Court for the Southern District of Florida.

2. That in or about the month of April, 1971, I was arrested and charged with violation of Title 21 U.S.C., Sections 173 and 174 in that it was alleged that I conspired together with Ramiro Gonzalez, Miguel Rodriguez, Joaquin Prado, Carlos Bance-Laye and Carlos A. Sarmiento and "various other persons presently unknown to the Grand Jury" to receive, conceal, buy, sell and facilitate the transportation, concealment and sale of heroin, contrary to the laws of the United States.

3. That in the month of May, 1971, my attorney, Max E. Kogen, Esq., with my knowledge and permission entered into a courseoff plea bargaining negotiations with Harold Keefe, the Assistant United States Attorney who was handling the case.

4. During the course of the discussions with respect to negotiation of the plea, it was agreed that the government would file a superseding information (71 Cr. 281) charging a "tax count" and that I would plead guilty to that tax count and that the prosecutor would recommend that I receive a five year prison term. As a part of these negotiations it was made clear to me that the reason I was accepting this bargain was that I could be granted a

parole from the sentence on the tax count whereas if I pleaded guilty to the conspiracy count there would not be a parole and I would serve a mandatory minimum of five years in prison. It was further understood by me and by my attorney that the conspiracy count charged in the original Florida indictment would be dismissed with prejudice to the government's renewal thereof and that I would never again be prosecuted with respect to any of my dealings with the other persons mentioned in the Florida indictment so long as those facts arose out of the same conspiracy as charged in said indictment.

5. I was induced to plead guilty to information Number 71 Cr. 281 charging the tax count solely by the representations of the government that the conspiracy chargesaid all facts and circumstances contained in said charges would be forever disposed of and that upon my serving the term imposed by Judge Choate as recommended by the prosecutor I would have paid my debt to society in full for having dealt in heroin with Ramior Gonzalez, Miguel Rodriguez, Joaquin Prado, Carlos Banos-Layo and Carlos A. Sarmiento.

6. During the voir dire of me in advance of my entering my plea of guilty in the United States District Court for the Southern District of Florida on May 24, 1971. The Judge asked me if I knew what the Court was doing there "...namely destroying the indictment and substituting the information." By the Judge's own statement when he said that we were destroying the indictment I took him to mean that the indictment charging the conspiracy was forever destroyed and that the same could not be reserected in a different Federal Court under the pretense that it was a different charge. In effect, I have served fifteen months in prison and almost eighteen months on parole and I am now in a worse position than had I gone to trial on the original conspiracy in Florida and had been found guilty.

7. I most respectfully urge this Court that I would never have pleaded guilty to the tax count in Florida unless it was represented to me that the conspiracy charge could never again be brought against me and that I had paid my debt in full to society for all the wrong doings which I participated in between December 1, 1968 and May 24, 1971.

WHEREFORE, it is respectfully prayed that the instant motion be granted and that the Court order a hearing with respect to the denial of due process due me by the obtaining of the plea of guilty to the tax count in the United States District Court for the Southern District of Florida.

Raul Ortega Alvarez
RAUL ORTEGA ALVAREZ

Sworn to before me this
22nd day of April, 1974.

Notary Public

UNITED S TATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- x
:
UNITED STATES OF AMERICA,
:
-against- AFFIDAVIT
:
RAUL ORTEGA-ALVAREZ, Indictment No. 74 Cr. 18
:
Defendant.
:
- x

STATE OF NEW YORK)
) SS.:
COUNTY OF NEW YORK)

HARVEY J. MICHELMAN, being duly sworn, deposes and says:

1. That I am the attorney for Raul Ortega the defendant herein and make this Affidavit in support of the instant motion for a hearing with respect to the denial of due process to Raul Ortega by reason of the broken prosecutorial promise in Florida that he would not be reprosecuted for the conspiracy in which he was charged in Miami or any facts arising out of the transactions set forth in said Indictment.

2. The motion should be granted because the combination of Ortega's Affidavit and the record of the proceedings in the United States District Court for the Southern District of Florida make out a prima facie case in support of the contention that Ortega was told that the conspiracy indictment would be dismissed and that said dismissal would be with prejudice to the government's right to the renewal or reprosecution thereof. In entering his plea of guilty to the substantive tax count Raul Ortega relied upon the representations of the United States Attorney and the Court that the conspiracy charge was "destroyed" not merely dismantled.

3. Common sense dictates that we recognize that implicit in the bargain between the prosecutor and the defendant was the agreement that in dismissing the conspiracy count that the government was dismissing the same forever. To deny this would negate all plea bargaining and the reasons therefore. An enlarged discussion of this matter is set forth in the Memorandum of

Law heretofore submitted in this matter.

By reason of all the foregoing it is respectfully prayed that the instant motion be in all respects granted and that the matter be set down for an evidentiary hearing to determine whether Raul Ortega was denied due process of law in his plea of guilty in the Southern District of Florida.

/s/
HARVEY J. MICHELMAN

Sworn to before me this
22nd day of April, 1974.

Notary Public

UNITED STATES OF AMERICA, :

Plaintiff, :

vs. :

RAUL ORTEGA-ALVAREZ, :

Defendant. :

:

AFFIDAVIT

Indictment No. 74 Cr. 18

STATE OF FLORIDA)
) SS
COUNTY OF DADE)

BEFORE ME, the undersigned Notary Public, personally appeared MAX B. KOGEN, who being by me first duly sworn, states on his oath as follows:

1. That the undersigned was counsel for Raul Ortega-Alvarez in Case No: 71-155-CR-JE in the United States District Court for the Sourthern District of Florida, during the year 1971.

2. That in the aforesaid case, Raul Ortega-Alvarez was charged as a conspirator together with Ramiro Gonzalaez, Miguel Rodriguez, Joaquin Prada, Carlos Banos-Layo and Carlos A. Sarmiento, mentioned in paragraph 1 of the Indictment as co-conspirators but not as defendants, and with various other persons unknown to the Grand Jury.

3. That on the date of the Trial, but prior to the impaneling of a jury, the Prosecutor, Harold Keefe, approached the undersigned and sought out information as to whether the defendant would be willing to plead guilty to the charge of conspiracy on some type of negotiable plea arrangement.

4. The Prosecutor informed the undersigned that he would be willing to agree and recommend to the Court a maximum sentence of five (5) years.

5. The undersigned pointed out to the Prosecutor that under the law then in existence; namely, Title 21, U.S.C.

Sections 173 and 174, such a sentence would not provide for the possibility of the defendant getting out on parole and that the defendant would have to serve the full five (5) years.

6. The Prosecutor then stated to the undersigned that we would have to take a five year sentence but asked whether Raul Ortega-Alvarez would be willing to plead guilty if he were to find a charge in which Ortega-Alvarez would not be facing a mandatory five years and where he would have an opportunity to obtain parole at such time as the parole system saw fit. (Although the words hereinabove attributed to the prosecutor are not verbatim what was said, the context and meaning is accurate).

7. After consultation between the undersigned and the defendant, the defendant agreed to plead guilty to a substitute Information numbered: 71-281-CR-JE. The purpose of such Information was merely to work out the negotiable plea within the framework of the negotiations between the prosecutor and the undersigned defense counsel.

8. On May 24, 1971, the defendant entered his guilty plea pursuant to the negotiated plea.

9. It was implicit and it was the understanding of the undersigned (although no understanding was directly evinced from the prosecutor) that such a plea would put an end to any charges which might have emanated from the conspiracy charge in Case No: 71-155-CR-JE and any other [redacted] MBK charges which may have occurred prior to pleading guilty on May 24, 1971 to the Information: 71-281-CR-JE.

FURTHER AFFIANT SAYETH NOT

Max B. Kogen

MAX B. KOGEN

SWORN TO and SUBSCRIBED
before me on this 25
day of April, 1974.

SN:ah
73-3290

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- x

UNITED STATES OF AMERICA, :

-v- :

RAUL ORTEGA ALVAREZ, et al., :

Defendants. :

AFFIDAVIT

74 Cr. 18 (CPM)

- x

STATE OF NEW YORK)
COUNTY OF NEW YORK : ss.:
SOUTHERN DISTRICT OF NEW YORK)

SHIRAH NEIMAN, being duly sworn deposes and says as follows:

1. My name is Shirah Neiman and I am an Assistant United States Attorney in the office of Paul J. Curran, United States Attorney for the Southern District of New York. I am in charge of the prosecution of the case and submit this affidavit in opposition to the defendant Raul Ortega Alvarez' motion for a hearing on the question of whether he was denied due process of law when he was indicted for the conspiracy charged in Count One of Indictment 74 Cr. 18.

2. This Court has previously on several occasions denied Ortega's motions to dismiss Count One on double jeopardy grounds, finding that Ortega was never put in jeopardy on the conspiracy indictment originally filed in the Southern District of Florida, but was only put in jeopardy, by his plea of guilty, on a tax count charging

SM:ah
73-3290

him with the sale of one kilogram of heroin on March 13, 1970 not in or from the original tax-stamped package.

3. Finding no assistance in the Double Jeopardy Clause Ortega now asserts that he pled guilty to a tax count in reliance on a promise allegedly made by the United States Attorney's Office in the Southern District of Florida that Ortega "would not be prosecuted in the Federal Courts with respect to his involvement with heroin arising out of the same set of facts", Defendant Ortega's Brief at p. 3; that his indictment in the Southern District of New York for the conspiracy charged in Count One of Indictment 74 Cr. 18 constituted a breach of that alleged promise; and that the due process clause of the Fifth Amendment requires that that alleged promise be enforced by dismissal of the Conspiracy Count.

4. As the record now stands in the instant case, nowhere is there a shred of proof that the promise now alleged was made, and indeed, quite to the contrary, the transcript of Ortega's plea in Florida establishes that no such promise was made. At the voir dire on the plea two things occurred that are important to the motion at bar. First, it was placed on the record that the Government was, on its own motion, dismissing the conspiracy charge and filing the Tax Count Information. The transcript reveals that this was nothing more than the routine "plea bargain" commonly engaged in under the "old" narcotics statute which

SN:ah
73-3290

entailed no promises at all with respect to future prosecutions in the Southern District of Florida or prosecutions in other districts. Second, the transcript discloses that any promise made to Ortega was explicitly set forth on the record, specifically, the Court was advised that the United States Attorney had agreed to recommend a five-year prison term with a provision for eligibility for parole at any time.

5. Up until this very date, the defendant has failed to submit his own affidavit or one by the attorney, who represented him in the Southern District of Florida stating under oath that the promise he now alleges was in fact made. The claim that such a promise was made is found only in the conclusory allegation of present counsel made in a memorandum of law. Such an unsupported allegation is clearly insufficient to even warrant this Court to hold an evidentiary hearing.* It is interesting to note that the attorney who represented Ortega in the Southern District of Florida, Max Kogen, Esq., also represented him in this case through the motion stage, and at no time did he allege or suggest that a promise had been made to Ortega in the Southern District of Florida which should bar this case.**

*This Court very generously invited counsel for Ortega to submit affidavits which would warrant holding an evidentiary hearing. Nevertheless, counsel has persisted for several months in failing to meet the requirement of alleging sufficient facts through competent affiants.

**Indeed, the allegation that such a promise had been made did not surface until after this Court denied Ortega's pre-trial Double Jeopardy motion; the Court of Appeals denied Ortega's petition for a writ of prohibition grounded on his Double Jeopardy claim; and this Court repeatedly during trial denied Ortega's Double Jeopardy motions. It was only after this Court specifically pointed out that the only conceivable claim Ortega had was one based on a breach of a prosecutorial promise, that the existence of such a promise was first alleged.

SN:ah
73-3290

6. Wherefore, it is respectfully requested based on the foregoing facts and the record of this case that an evidentiary hearing be denied and the motion to dismiss the Conspiracy Count be in all respects denied.

SHIRAH WEIMAN
Assistant United States Attorney

Sworn to before me this
12th day of April, 1974.

SN:cw
73-3290

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA :

-v- : GOVERNMENT'S AFFIDAVIT IN OPPOSITION

RAUL ORTEGA ALVAREZ, :

Defendant. : 74 Cr. 18

STATE OF NEW YORK)
SOUTHERN DISTRICT OF NEW YORK : ss.:
COUNTY OF NEW YORK)

SHIRAH NEIMAN, being duly sworn, deposes and says:

1. My name is SHIRAH NEIMAN and I am an Assistant United States Attorney in the office of Paul J. Curran, United States Attorney for the Southern District of New York, and I am in charge of the above-captioned case. I submit this affidavit in opposition to the defendant Ortega's request for a hearing on whether a prosecutorial promise in the Southern District of Florida was made and constitutes a bar to a conviction on the conspiracy count in the instant indictment.

2. Attached hereto as Exhibit A is the affidavit of Harold F. Keefe, the Assistant United States Attorney in the Southern District of Florida who handled Ortega's case in that district. It is clear from Mr. Keefe's affidavit that no promises of any sort were made to Mr. Ortega or his attorney except those regarding the sentence which the Government would recommend if he pled guilty to a tax count.

SN:ew
73-3290

3. I was advised by Mr. Harvey Michelman, Esq., who now represents Ortega that Max Kogen, Ortega's attorney in the Florida proceedings would be submitting an affidavit in support of Ortega's motion. Because the affidavit has apparently not yet arrived in the mails, I took the liberty of telephoning Mr. Kogen, who was kind enough to have his secretary read the affidavit to me. It is perfectly clear from Mr. Kogen's affidavit that there was no prosecutorial promise in the Southern District of Florida as now alleged by Raul Ortega. The "implicit" promise or understanding spoken of by Mr. Kogen does not constitute a promise by the prosecutor. Moreover, it is the Government's position that the agreement reached between Ortega and the prosecution in the Southern District of Florida could not have led experienced defense counsel to reach the conclusions he now alleges.

4. It is respectfully submitted that based upon the affidavits of Mr. Keefe and of Max Kogen, the defense has failed to sustain its allegation that a prosecutorial promise was made in the Southern District of Florida which would constitute a bar to this prosecution and that no evidentiary hearing is required to further develop the facts.

WHEREFORE, it is respectfully submitted that the defendant Ortega's motion be denied on the merits without a hearing.

SHIRAH NEIMAN
Assistant United States Attorney

Sworn to before me this
26th day of April, 1974.

HFK:rf

AFFIDAVIT

My name is HAROLD F. KEEFE, and I am an Assistant United States Attorney and have been one since October of 1970. I was the Assistant United States Attorney who handled the case of the United States v. Raul Ortega. The case was 71-281-CR-EC. On the day the case was set for trial I had a meeting with Max Kogen, defense counsel for Raul Ortega. It was understood and agreed between myself and defense counsel that instead of pleading guilty to the conspiracy indictment in which Ortega was charged, that an information would be filed charging a tax violation, and defendant would plead guilty to that count. The reason for the agreement was, under the conspiracy count the defendant faced a minimum mandatory five-year jail sentence and no probation, no parole. Under the information there was no minimum mandatory sentence, and a five-year sentence was agreed upon between defense counsel and the Government, with the understanding that he would be eligible for parole or early release under the information sentence.

There were no promises made by the Government to the defendant that he would not be prosecuted in any other jurisdiction because of his guilty plea in the instant case. The only agreement between the Government and the defendant regarding this case was that he be allowed to plead to the information so that he wouldn't face the minimum mandatory five-year sentence without the possibility of parole or probation. There were no other promises or agreements between the Government and defense counsel or the defendant in this case.

Harold F. Keefe

HAROLD F. KEEFE

United States v. Raul Ortega Alvarez
74 Cr. 18

At the end of the government's case in the above entitled matter, the court denied defendant Raul Ortega Alvarez' motion for a directed judgment of acquittal. The court indicated that it was not persuaded by counsel's urging of the defense of double jeopardy. The court did indicate that perhaps there might be a possible violation of this defendant's Fifth Amendment rights, something which counsel had not even suggested at any time during the course of the proceedings. In any event, the court indicated that it would consider the possibility of an evidentiary hearing as to such violation in the event defendant was convicted by the jury.

On March 21, 1974, counsel for this defendant was advised that if he desired such a hearing, he would have to persuade the court by affidavit and brief to be filed in support of such a motion. Counsel has submitted a memorandum of law which assumes the breach of an agreement made with the Assistant United States Attorney at the time of defendant's plea of guilty to a prior charge in the Southern District of Florida.

This is a far cry from persuading the court by affidavit that there is a basis to conduct an evidentiary hearing.

No affidavits were submitted to support the defendant's contention. Rather, reference is made in counsel's brief to the transcript of the change of plea and sentence, all of which occurred on the same day. There was nothing in this transcript that would warrant the holding of an evidentiary hearing.

Motion denied.

So ordered.

Dated: New York, N. Y.
April 16, 1974

Charles H. Tenney
U. S. D. J.